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In The

Supreme Court of the United States

October Term 1997

RANDON BRAGDON, D.M.D.,

Petitioner,

v.

SIDNEY ABBOTT ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE *AMICUS CURIAE* THE AMERICAN DENTAL ASSOCIATION IN SUPPORT OF PETITIONER RANDON BRAGDON, D.M.D.'S PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS

The AMERICAN DENTAL ASSOCIATION (the "Association"), an Illinois not-for-profit corporation founded in 1859, is the leading dental association in the United States with over 140,000 member dentists representing approximately 75% of this nation's active licensed dentists. The stated object of the Association, as set forth in its Constitution, is to "encourage the improvement of the health of the public and to promote the art and science of dentistry." The Association has a vital interest in matters which affect the oral health of the public, and a long record of educating dentists and the public about HIV/AIDS and the safety of the dental office.

The Association urges this Court to grant the portion of Petitioner Randon Bragdon, D.M.D.'s Petition for Writ of Certiorari pertaining to the definition of "disability" under the Americans with Disabilities Act (the "Act").[1] Resolution by this Court of whether persons with asymptomatic HIV-disease have a "disability" under the Act, when their claim of "disability" status rests on an asserted inability to reproduce, is needed to help clarify the legal obligations of health care providers under the Act.

All parties to the Petition have consented to the filing of this Brief, as reflected in the consent letters separately submitted to this Court. Pursuant to the Court's rules, the Brief brings to the attention of the Court relevant matter, from the

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[1] No counsel for a party authored any part of this *amicus curiae* brief, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief. (Rule 37.6 of the Supreme Court of the United States.)

perspective of America's leading dental association, not already brought to the Court's attention by the Petitioner. (Rule 37.1 of the Supreme Court of the United States.) Every effort has been made to avoid or minimize duplication with the Petition.

The brief does not in any way challenge or undermine long-standing Association policy concerning the safety of the dental office and/or the treatment of HIV-infected individuals.[2] Nor does it challenge whether someone who exhibits symptoms of HIV, including AIDS, is "disabled."

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[2] As set forth in our *amicus curiae* brief below, the Association stands by its self-explanatory, cornerstone policies that (1) HIV-individuals should be treated with compassion and dignity, (2) there is little risk of transmission of HIV through dental treatment if recommended infection control procedures are routinely followed, (3) patients with HIV infection may be safely treated in private dental offices when appropriate infection control procedures are employed, (4) such infection control procedures provide protection both for patients and dental personnel, and (5) a decision not to provide treatment to an individual because the individual has AIDS or is HIV seropositive, based solely on that fact, is unethical. American Dental Association's Policy Statement on AIDS, HIV Infection and the Practice of Dentistry (1988:457; 1991:591), Appendix at 273; ADA Principles of Ethics and Code of Professional Conduct, Section 1-A, Patient Selection, Advisory Opinion 1 (1988), Appendix at 276. In addition, after the filing of our brief below, the Association established policies Efficacy of Universal Precautions and Policy Statement on HIV/AIDS as an Infectious and Communicable Disease providing, *inter alia*, that (6) based on current scientific and epidemiological data, universal precautions continue to be an effective means of reducing blood contacts that can result in disease transmission, minimizing even further the already low risk of bloodborne disease transmission in the dental office, (7) given that data, patients with bloodborne diseases may be treated in the private dental office with no significant risk of disease transmission, provided appropriate infection control procedures are employed and (8) in Association communications on this issue, members be reminded that a patient's HIV/AIDS status is not a justification for refusal of treatment (1996: 734-735).

SUMMARY OF ARGUMENT

Based on our experience assisting dentists trying to comply with the Americans with Disabilities Act (the "Act"), the Association believes that a clear pronouncement by this Court is needed to clarify whether dentists and other health care providers have a legal obligation under the Act to treat individuals with asymptomatic HIV-disease, where a patient's only claim of actual disability is an asserted inability to reproduce, as in the instant case. In view of a circuit court split on the issue of whether reproduction is a "major life activity" under the Act, it is important that this Court squarely address the issue to determine whether individuals with such conditions are entitled to "disability" status under the Act, and to reject a *per se* "disability" rule for HIV. A decision by this Court would help effectuate the educational purposes of the Act[3], and make more clear for providers the scope of their legal obligations.

ARGUMENT

This Court Should Resolve The Split In The Circuits Regarding Whether "Reproduction" Is A "Major Life Activity" Under The Americans With Disabilities Act

Some persons with asymptomatic HIV-disease, like Respondent Ms. Abbott, have claimed "disability" status

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[3] 42 U.S.C. §1201(b) and related agency guidances.

under the Act based on their position that their ability to reproduce is substantially limited by their HIV infection. However, if Ms. Abbott had sought dental care within the jurisdiction of the Fifth or Eighth Circuits, rather than the First, her case might have been decided differently. The reason: a federal appeals court conflict regarding whether "reproduction" is a "major life activity" under the Act.

At least two federal appeals courts have rejected the argument that reproduction is a "major life activity." The court in Zatarain v. WDSU-Television, Inc., 881 F.Supp. 240, 243 (E.D.La. 1995), aff'd, 79 F.3d 1143 (5th Cir. 1996) reasoned that reproduction is not an activity engaged in with the same degree of frequency as the illustrative list of activities in the regulations and therefore treating reproduction as a major life activity under the ADA would be a conscious expansion of the law beyond the province of the court. Likewise, the court in Krauel v. Iowa Methodist Medical Center, 95 F.3d 674, 677 (8th Cir. 1996) held that reproduction is not a "major life activity," agreeing with the Zatarain position that to treat reproduction as a major life activity under the ADA would be a considerable stretch of federal law.

By concluding that reproduction is a "major life activity" under the ADA, the court in Abbott v. Bragdon, 107 F.3d 934, 941 (1st Cir. 1997), is in direct conflict with the above mentioned federal appeals court decisions.

In view of the circuit court split, health care providers have no uniform guidance regarding whether the Act requires them to treat persons with asymptomatic HIV-disease when, like Ms. Abbott, their sole claim of actual disability is based on an asserted inability to reproduce. Accordingly, for millions of Americans – including health care providers,

individuals with asymptomatic HIV-disease, and those who associate with them – there is compelling reason for this Court to hear the case. (Rule 10(a) of the Supreme Court of the United States.)

Absent a resolution of the issue by the Court, health care providers in some Circuits may have a legal obligation to treat certain asymptomatic HIV patients, while providers in other Circuits may not. This leaves the Association's approximately 140,000 member dentists in legal limbo, and we implore the Court to hear this case in order to provide an answer to the important issue of whether an asymptomatic HIV patient is "disabled" because of an asserted inability to reproduce.

This Court Should Determine That The Americans With Disabilities Act Does Not Allow For A Disability *Per Se* Treatment Of Any Condition, Including HIV Disease

This Court should also grant the Petition because the First Circuit's ruling comes dangerously close to the adoption of a disability *per se* rule for HIV disease.[4] Had Congress

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[4] As set forth in Dr. Bragdon's Petition For Writ Of Certiorari, there is arguably a circuit split regarding whether persons with asymptomatic HIV-disease are *per se* disabled under the Act. Petition at 10-11. In amending its original decision, the First Circuit highlighted that "Congress deemed HIV-infected individuals to be disabled under the ADA," quoting from the Act's legislative history that reflected "[p]ersons infected with the Human Immunodeficiency Virus are considered to have an impairment that substantially limits a major life activity, and thus are considered disabled under the first test of the definition...[and] a person infected with [HIV] is covered under the first prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual

expressly sought to single HIV/AIDS out for special consideration, that would be one thing. But Congress did not. Rather, in framing the Americans with Disabilities Act, Congress relied upon a definition borrowed from the Rehabilitation Act, passed long before the advent of the AIDS epidemic.[5]

The statutory definition does not enumerate a list of disabilities, but rather begins by characterizing "disability" as a "physical or mental impairment that substantially limits one or more of the major life activities" of the individual in question. 42 U.S.C. § 12102(2)(A). Accordingly, whether any particular plaintiff is disabled under the Act requires an individualized application of a not explicitly defined legal standard as to what constitutes both a major life activity and a substantial limitation of that activity. Indeed, the plain language of the ADA militates against finding HIV disease to be a disability *per se* and compels a case-by-case determination of whether a given individual is disabled by HIV/AIDS. Ennis v. National Ass'n of Business and Educ. Radio, Inc., 53 F.3d 55, 59-60 (4th Cir. 1995).[6]

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relationships." Abbott v. Bragdon, 107 F.3d 934, 942-43 (1st Cir. 1997). According to the Court, the "legislative history thus independently bolsters our conviction that Ms. Abbott is disabled under the ADA." Id. In point of fact, however, this added language risks tilting all other courts towards a *per se* rule for HIV.

[5] H.R. Rep. No. 485, Part 2, 101st Cong., 2nd Sess., 50 (1990).

[6] As this Court well knows, lower courts are struggling with the Act's "disability" definition outside the context of HIV. For example, some courts have held that cancer is a disability, Mark v. The Burke Rehabilitation Hospital, 1997 WL 189124 (S.D.N.Y. 1997); some courts have held it is not. Ellison v.

As set forth in our *amicus* brief below, applying the statutory definition in the instant case leads to one of two results: either Respondent, Ms. Abbott, was not disabled when she sought treatment from Petitioner, Dr. Bragdon, or the determination of disability needed to be made by the trier of fact, rather than on summary judgment.[7]

The Association urges the Court to reject the application of a disability *per se* rule to HIV. Applying a blanket *per se* rule solely for diseases *de jour* can be confusing to the point that those charged with compliance, and the public in general, might genuinely loose confidence in the law, the lawmakers, and the courts that interpret the law. Laws must be consistently and fairly applied to instill public confidence, and compliance with the Act is likely to be optimized if it is applied consistently with respect to all diseases and conditions. Indeed, one of the Act's express purposes is "to provide clear, strong, consistent, enforceable

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Software Spectrum, Inc., 85 F.3d 187, 191 (5th Cir. 1996). Some courts have held that diabetes is a disability, Sarsycki v. United Parcel Service, 862 F.Supp. 336, 340 (N.D.Ok. 1994); some courts have held it is not. Gilday v. Mecosta County, 920 F.Supp. 792, 795 (W.D.Mi. 1996). What these cases all have in common is the application of the Act's "disability" definition to the facts of the particular case. They eschew the application of a *per se* rule.

[7] Based on the record in the instant case, including Respondent's contradictory deposition testimony, reasonable people could disagree as to whether Respondent's ability to reproduce was "substantially limited" by her asymptomatic HIV-infection. Accordingly, the issue of Respondent's alleged "disability" was unsuitable for summary judgment and should have been resolved by the trier of fact.

standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 1201(b)(2) (emphasis added).

This Court should send a clear message that there are no "special" disabilities, and that all diseases and conditions will be judged by the same, apolitical "disability" definition that was time tested long before the advent of HIV. Doing so is necessary to assure that the law, as written, keeps up with scientific developments. Consider, for example, the advent of protease inhibitors and their miraculous impact on the lives of persons with HIV-disease. By the nature of this scientific development, many persons once living with a death sentence now have hope. The First Circuit's opinion is predicated, in part, on the notion that Ms. Abbott could not reproduce; the court reached that determination based on a broad definition of reproduction, including that Ms. Abbott would not be alive long enough to mother a child.[8] The First Circuit purposefully limited its opinion to the facts of the case, recognizing that scientific developments might change how it resolved future cases.[9] The question must be asked: with the benefits of protease inhibitors, would a similarly situated woman prevail in the First Circuit today? The application of a *per se* rule would not allow this or other important questions to be asked, let alone answered. This Court should accept the portion of the Petition related to the "disability" definition, if only to establish that the law can adjust to such developments.

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[8] Abbott v. Bragdon, 107 F.3d 934, 939-41 (1st Cir. 1997).

[9] Id. at 948. While the First Circuit left the door open for consideration of different facts, including those based on scientific developments, its decision, including by its construction of the Act's legislative history, still comes dangerously close to the application of a disability *per se* rule for HIV-disease.

CONCLUSION

The American Dental Association urges this Court to accept Dr. Randon Bragdon's Petition for Writ of Certiorari in order to address the "disability" issues offered for review. The Association believes resolution by this Court of the "reproduction" and "*per se*" issues are of paramount importance, in order to resolve a split in the circuit courts and to provide clear guidance to health care practitioners about their obligations to treat individuals with asymptomatic HIV-disease under the Americans with Disabilities Act, where those individuals claim "disability" status solely by virtue of an asserted inability to reproduce. The Association has endeavored to facilitate the educational purposes of the Americans with Disabilities Act by informing America's dentists and the patients they serve about their rights and obligations under the Act, and the safety of the dental office. We urge the Court to resolve the circuit split and provide clear guidance to our members.

Respectfully Submitted,

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